Litigation Section of The State Bar of Califonia

Litigation Update

Litigation Section News

May 2008

Non-employer individuals are not liable for retaliation. In *Reno v. Baird* (1998) 18 Cal.4th 640, [957 P.2d 1333, 76 Cal.Rptr.2d 499], the California Supreme Court held that, although an employer may be liable under the Fair Employment and Housing Act (*Gov.Code* §§12900 ff.), non-employer individuals were not subject to FEHA. In *Jones v. The Lodge at Torrey Pines Partnership* (Cal.Supr.Ct.; March 3, 2008) 42 Cal.4th 1158, [2008 DJDAR 3101], a divided Supreme Court followed the same rule in actions for retaliation, holding that the employer, but not non-employer individuals, could be held liable

Anti-SLAPP statute applies in federal court. Although it is a procedural device, the anti-SLAPP statute (*Civ.Proc.* §425.16 ff.) is applied in California cases filed in federal court. *See, Vess v. Ciba-Geigy Corp.* (9th Cir. 2003) 317 F.3d 1097; *Manufactured Home Communities, Inc. v. County of San Diego* (9th Cir.; March 6, 2008) [2008 DJDAR 3325]. However, the discovery limiting provisions of the statute violate federal rules and therefore, are not applied in federal court. *Metabolife Intern., Inc. v. Wormwick* (9th Cir. 2001) 264 F.3d 832.

Sophisticated user defense trumps duty to warn. In a case of first impression, a unanimous California Supreme Court has adopted the "sophisticated user defense." Where the injured users of products have received training, as a result of which they knew or should have known the risk of harm, they cannot recover for failure to warn of the danger. The defense applies both to negligence and strict liability causes of action. *Johnson v. American Standard, Inc.* (Cal.Supr.Ct.; April 3, 2008) (Case No. S139184) [2008 DJDAR 4701].

A party seeking contractual arbitration cannot contest the validity of the contract. *California Code of Civil Procedure* §1281.2 requires that parties moving to compel arbitration "allege the existence of a written agreement to arbitrate." In *Brodke v. Alphatec Spine, Inc.* (Cal. App. Fourth Dist, Div. 3; March 20, 2008) 160 Cal.App.4th 1569, [2008 DJDAR 3908], plaintiffs attached a purported contract containing an arbitration clause to their complaint. While denying the validity of the purported contract, defendant moved to compel arbitration. Motion denied. Denial affirmed. The court must deny the motion to compel arbitration where the moving party disputes the existence of the contract containing the arbitration clause.

Opinion regarding potential malpractice claim may not invalidate insurance. Herbert Schenk agreed to represent the Nolans in connection with a failed business venture. Schenk did nothing. One week before he acknowledged to the Nolans that he had failed to properly represent them, he applied for malpractice insurance and stated on his application that there were "no known claims." After the Nolans sued Schenk for malpractice, the insurer refused to defend. When Schenk sued, the U.S. District Court (Arizona) granted the insurer's motion for summary judgment. The Ninth Circuit reversed and remanded the case for trial. Whether Schenk could have foreseen the malpractice action was a question of fact. *James River Insurance Company v. Herbert Schenk*, P.C. (9th Cir.; March 18, 2008) (Case No. 06-15622) [2008 DJDAR 3717].

Diligence required before "newly discovered evidence" may be the basis for a new trial. Evidence that was available, but not presented, before a judgment was entered, cannot provide the basis for the grant of a new trial. Also lack of diligence in obtaining evidence may preclude the grant of a new

Litigation Section Events

A Week in Legal London
June 29-July 4, 2008

A Week in Legal London is an extraordinary opportunity to experience the inner workings of the English legal system, expand litigation skills and engage in thought provoking discussions with leading distinguished members of the London legal community. Attend sessions at the Royal Courts of Justice, the Old Bailey, Magistrates and Crown Courts. Meet and dine with leading judges, barristers and solicitors. Visit the four Inns of Court and historic sites in London.

Oxford University Summer Program
Magdalen College, Oxford University

July 6-11, 2008

In conjunction with A Week in Legal London, the Litigation Section's Oxford University Summer Program is an "inside the walls" experience at Magdalen College, Oxford University. This program is a combination of both law and history, fascinating to all participants, attorneys and non-attorneys alike. You can choose to attend either the London or Oxford program or both. By attending both programs you will satisfy all you MCLE requirements including the mandatory subjects.

For a more complete description of each program see our web site, or call the Litigation Section at (415) 538-2546.

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trial. *Doe v. United Airlines, Inc.* (Cal. App. Second Dist., Div 4; March 20, 2008) 160 Cal.App.4th 1500, [2008 DJDAR 3844].

Note: Here the grant of a new trial after summary judgment was reversed. Once summary judgment has been entered, a motion for reconsideration does not lie. The proper procedural device to seek reversal in the trial court of a summary judgment is a motion for a new trial. After summary judgment has been entered, the motion is subject to the same conditions and time limits as for such a motion after judgment is entered following a jury or bench trial. *See, Code Civ. Proc.* §§656 ff.; Weil & Brown, *California Civil Procedure Before Trial* (The Rutter Group), Chapter 10, §§10:372 ff.

Justice Kozinsky elaborates on the well known doctrine of *uberrimae fidei*. In an opinion most notable for its opening line Justice Kozinski writes: "We consider the doctrine that's on everyone's lips: *uberrimae fidei*." For those few of you who have never heard of the doctrine, it is the requirement that an applicant for maritime insurance is under a duty of utmost good faith in disclosing potential risk factors. *New Hampshire Insurance Co. v. C'Est Moi, Inc.* (9th Cir.; March 20, 2008) (Case No. 06-55031) [2008 DJDAR 3825]. *California Insurance Code* §1900 contains a similar requirement without using the phrase that is on "everyone's lips."

Must defrauded insured return monies paid by insurer before suing for fraud? The California Supreme Court has granted hearing in *Village Northridge Homeowners Association v. State Farm Fire and Casualty Co.* (Cal. App. Second Dist., Div. 8; December 17, 2007) 157 Cal.App.4th 1416, [69 Cal.Rptr.3d 551]. After settling an earthquake claim for $1.5 million, the insured allegedly discovered that the policy limit was $7 million more than the insurer had represented. The insured sued for fraud. The trial court sustained State Farm's demurrer, holding that the insured could only maintain the action if it rescinded the settlement contract and returned the $1.5 million. The Court of Appeal reversed, holding that the insured was not required to rescind before maintaining the suit. (Supreme Court Case No. S161008, review granted March 26, 2008). We will keep you posted.

Expert opinions must be supported by admissible facts. In *Garibay v. Hemmat* (Cal. App. Second Dist., Div. 3; April 1, 2008) (Case No. B194919) [2008 DJDAR 4626] the trial court granted summary judgment for the defendant in a medical malpractice case. The judgment was based on the declaration of an expert witness who lacked personal knowledge but based his opinion that there had been no breach of the standard of care on his review of the medical records. But these records were not filed as part of the motion. The Court of Appeal reversed. The expert opinion, standing alone, was insufficient. Moving party should, in addition, have supported the motion with the records themselves, which could have been admitted under the business records exception to the hearsay rule.

Default may not be entered against "involuntary plaintiffs." Where complete relief cannot be granted because of the absence of potential plaintiffs (e.g., claimants to a common fund), they must be joined as defendants. *Code Civ. Proc.* §382; *see also*, Weil & Brown, *California Civil Procedure Before Trial* (The Rutter Group), Chapter 2, §2:158 ff. Such "involuntary plaintiffs" are defendants in name only and no default may be taken against them. *Ferraro v. Camarlinghi* (Cal. App. Sixth Dist.; March 27, 2008) [2008 WL 803376, 2008 Cal. App. LEXIS 423].